

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

Closed Captioning and Video Description of
Video ProgrammingImplementation of Section 305 of the
Telecommunications Act of 1996

Video Programming Accessibility

MM Docket No. 95-176

PETITION FOR PARTIAL RECONSIDERATION

Outdoor Life Network, L.L.C. ("Outdoor Life"), Speedvision Network, L.L.C. ("Speedvision") and The Golf Channel ("Golf") (collectively, "Petitioners") submit this Petition for Partial Reconsideration of the Commission's Report and Order, FCC 97-279 (rel. August 22, 1997) ("Order") in the captioned proceeding.

I. SUMMARY

Petitioners, three recently-launched, basic cable programming networks, request the Commission to make two minor—but vitally important—adjustments to the "new network" exemption, 47 C.F.R. § 79.1(d)(9), under which a new network is not required to caption its programming during the first four years after launch. As Petitioners explain, the exemption, as currently structured, provides insufficient relief to new networks generally and no relief at all to numerous recently-launched networks such as Petitioners. As a result, many recently-launched or soon-to-be-launched networks—those who the Commission seemingly (and appropriately)

intended to protect—will suffer substantial economic hardship under the pending closed captioning rules.

Three features of the exemption and the captioning rules will prevent the exemption from providing meaningful relief to new networks: (1) the requirement that a new network must "drop-in" at the then-applicable compliance level for captioning new programming immediately upon the exemption's expiration; (2) the provision that the exemption period for new networks will last only four years from launch; and (3) the provision that compliance with requirements for captioning of new programming will be measured on an absolute basis rather than as a percentage of new programming displayed.

Petitioners ask the Commission to make two modest adjustments to its new network exemption: (1) to extend the exemption period to **five years** from launch, and (2) to provide that, once a network's new network exemption expires, it will be afforded the **full eight-year transition period** for compliance with captioning requirements applicable to new programming. Petitioners are not asking the Commission to make wholesale changes to its carefully-balanced captioning rules. Rather, the requested adjustments are only the minimum changes needed to ensure that the exemption will afford real, rather than illusory, relief from the economic burdens of captioning for new networks generally and for recently-launched networks such as Petitioners, in particular.

II. IDENTIFICATION OF PARTIES AND BACKGROUND

Petitioners are three recently-launched, basic cable niche programming networks that are struggling to achieve commercial viability in the highly competitive marketplace of multichannel

video programming. As Petitioners discussed in their Comments,¹ Golf, Outdoor Life and Speedvision launched in January 1995, June 1995, and January 1996, respectively, and each distributed their programming to between six and eight million subscribers.

Petitioners also explained in their Comments that the multichannel programming marketplace is highly competitive and is characterized by substantial barriers to entry for new networks.² New networks incur substantial losses for many years, as their start-up costs are enormous and their revenues limited during their early years of operation. New networks must invest heavily in the production and acquisition of high-quality programming and incur huge costs to produce and distribute their product (*e.g.*, research, facilities, marketing and promotion, personnel and signal transmission). At the same time, their sources of revenue—affiliation fees and advertising—are extremely limited. Until a network becomes established, it can derive little, if any, revenue from MVPDs for its programming; in fact, in today's marketplace, new networks must often pay MVPDs to gain carriage on largely channel-locked cable systems, and must, at a minimum, provide MVPDs with extremely aggressive launch packages. Advertising revenues are also insignificant for new programmers because few national television advertisers place significant advertising on cable networks until they reach a threshold size—often 20 million subscribers.

¹ *Implementation of Section 305 of the Telecommunications Act of 1996—Video Programming Accessibility*, Comments of Outdoor Life, *et al.* (filed February 28, 1997, corrected copy filed March 6, 1997) ("Comments") at 5 - 9.

² Comments at 9 - 15.

Petitioners have a strong interest in this proceeding. Petitioners submitted Comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM"),³ and made a number of *ex parte* presentations to Commission staff.⁴ The reason for Petitioners' keen interest is simple: given their limited financial resources, staggering expenses, and huge accumulated losses, the closed captioning requirements will have a substantial and disproportionately adverse impact on Petitioners' operations, and may threaten some emerging networks' very existence.

In their Comments and *ex parte* presentations, Petitioners consistently urged the Commission to exempt national basic cable networks with fewer than 20 million subscribers from mandatory closed captioning. The 20 million subscriber threshold represents the *earliest* point at which most national basic cable networks can reasonably begin to shoulder the economic burden of closed captioning (*i.e.*, the point at which they begin to turn the corner to economic viability). Petitioners continue to believe that this standard is the most appropriate proxy to determine when a network can realistically manage to begin captioning some portion of its programming.

Indisputably, the Commission faced difficult choices in the creation of its closed captioning rules. Congress intended the Commission to balance the goal of improving access to video programming for persons with hearing disabilities against the reality that captioning will impose an economic burden upon certain classes of video providers and programming. The

³ *Implementation of Section 305 of the Telecommunications Act of 1996—Video Programming Accessibility*, Notice of Proposed Rulemaking, 12 FCC Rcd. 1044 (1997).

⁴ See Cole, Raywid & Braverman *Ex Parte* Memorandum to William H. Johnson, *et al.*, July 16, 1997; Cole, Raywid & Braverman *Ex Parte* Memorandum to William H. Johnson, *et al.*, July 24, 1997.

Commission was assigned the daunting task of implementing general captioning requirements while, at the same time, fashioning exemptions that would provide relief for those providers and classes of programming upon which mandatory closed captioning would impose an economic burden.

Petitioners appreciate that such "line drawing" is by no means an easy assignment, and believe that, in most areas, the Commission struck an appropriate balance between improving access to video programming and the economic reality of captioning costs. Nonetheless, Petitioners are compelled to request that the Commission reconsider several aspects of the new network exemption and make two minor, but vitally important, adjustments to this regulatory exemption. Without these adjustments, the new network exemption will be illusory and the captioning rules will impose a substantial and disproportionately adverse impact upon new networks.

III. THE NEW NETWORK EXEMPTION AFFORDS MOST NEW NETWORKS INSUFFICIENT RELIEF, AND PROVIDES PETITIONERS AND MANY OTHER RECENTLY-LAUNCHED NETWORKS NO RELIEF WHATSOEVER, FROM THE CLOSED CAPTIONING MANDATES

In the Order, the Commission adopted an exemption for new programming networks, whereby a network will not be required to caption during the first four years after launch.⁵ The Commission adopted this rule in recognition of the "significant start-up costs" facing new networks and the fact that "additional costs of captioning could pose an economic burden that might deter entry by some networks."⁶

⁵ 47 C.F.R. § 79.1(d)(10); Order at ¶ 154.

⁶ Order at ¶ 154.

Petitioners commend the Commission for its attempt to mitigate the harmful impact of the pending rules upon new programming networks. However, there are three features of the exemption and the captioning rules that, together, will prevent the exemption from serving its intended purpose of providing meaningful relief to new networks from the burdens of closed captioning: (1) the requirement that a new network must "comply with the closed captioning rules once its exemption expires,"⁷ *i.e.*, that a network must "drop-in" at the then-applicable compliance level for captioning new programming immediately upon the exemption's expiration; (2) the provision that the exemption period for new networks will last only four years from launch; and (3) the provision that compliance with requirements for captioning of new programming will be measured on an absolute basis rather than as a percentage of new programming displayed. As explained below, the rule, as currently structured, provides insufficient relief to new networks generally and provides Petitioners and many other recently-launched networks no relief whatsoever. Thus, notwithstanding the exemption, many recently-launched or soon to be launched networks—those who the Commission seemingly intended to protect—will suffer substantial economic hardship as a result of the pending closed captioning rules.

A. The Requirement That New Networks, Upon Expiration Of The Four Year Exemption, Come Into Full Compliance With The Then-Applicable Captioning Requirements Renders The New Network Exemption Meaningless To Recently-Launched Networks

Under the new network exemption, as presently constructed, a recently-launched network must come into compliance with applicable captioning requirements for new programming

⁷ Order at ¶ 154.

immediately upon the expiration of the four year exemption. For example, Golf's new network exemption will expire in January 1999, as it launched in January 1995. Similarly, the exemptions of Outdoor Life and Speedvision will expire in June 1999 and January 2000, respectively. The Commission's first benchmark for required captioning of new programming occurs in the first quarter of 2000. At that time, Petitioners will be required to caption their programming to the same extent as they would have if they had not been exempt in the first place, and at the same level as larger, established, profitable networks such as ESPN, Discovery Channel or USA Network, which have approximately 70 million subscribers each.⁸ Clearly, Petitioners are not on the same financial footing as the large cable networks—nor will they be in January 2000. Yet, under the rules as currently structured—even with the new network exemption—their treatment is identical. Thus, the new network exemption provides absolutely no relief for Petitioners, each recently-launched networks that were principal proponents of, and advocates for, adoption of the new network exemption.

Moreover, to the extent that a new, yet-to-be-launched network will be expected, upon expiration of its four year exemption, to immediately comply with the then-applicable captioning requirements, the relief from those requirements that such new networks will enjoy even during the four year exemption period will be more apparent than real. The captioning of hundreds of hours of programming per quarter cannot be achieved instantaneously, like throwing a switch. Rather, if new networks are required, upon expiration of their exemptions, to "drop-in" fully at the then-applicable level of compliance, they will have to begin their compliance efforts long

⁸ National Cable Television Association, Inc., CABLE TELEVISION DEVELOPMENTS—SPRING 1997, at 16.

before. In other words, even during the exemption period, they will have to purchase captioning equipment, to make contractual commitments for acquisition of captioned programming, and to begin incurring all of the other costs of complying with the captioning requirements.⁹

Petitioners are not alone in this predicament. In the years 1994 to 1996, 46 new national basic cable networks were launched.¹⁰ Only a handful of these networks have reached the critical 20 million subscriber mark.¹¹ The vast majority, like Petitioners, are struggling to achieve

⁹ Although networks that have yet to commence service will also find that the new network exemption, as presently composed, provides insufficient relief, this situation is even more pronounced with respect to *recently-launched networks* such as Petitioners. Networks such as Petitioners, which launched in the past several years, did so without warning of future closed captioning requirements and during an extremely difficult economic period for the cable industry—one characterized by delayed system expansions and upgrades and a severe scarcity of available channels. These recently-launched networks have faced a steady stream of regulatory and statutory impediments (*e.g.*, rate regulation, must-carry and retransmission requirements, and leased access rate reductions), which further constricted the number of channels available to new networks. Moreover, these networks will have to begin complying with the captioning requirements at a time when captioning resources and captioned programming are at their scarcest, and the cost of captioning is at its highest.

While networks that emerge in the future undoubtedly will face difficult challenges, they will be in a better position than Petitioners and other recently-launched networks to comply with the captioning requirements since these networks will have the added benefits of: (1) advanced knowledge of pending captioning mandates, which allows for long-term budgeting of captioning costs, (2) improved captioning technology, (3) an increased supply of trained captioners and captioned programming, and (4) overall reduced captioning costs. In short, the burden of the illusory nature of the new network exemption will be most sorely felt by recently-launched networks such as Petitioners, and it is therefore particularly important that the Commission adjust the new network exemption in order to meaningfully extend its shelter to Petitioners and other recently-launched networks like them.

¹⁰ National Cable Television Association, Inc., *CABLE TELEVISION DEVELOPMENTS—SPRING 1997*, at 6 (computed from table of national cable video networks).

¹¹ Those few that have done so have benefitted from extremely aggressive launch packages (*e.g.*, Animal Planet and Fox News Channel). See Jim Cooper, *Throwing Money Around*, *CABLEVISION*, January 27, 1997, at 14 - 17. A few others have done so by being tied to successful, existing networks (*e.g.*, The History Channel, which is promoted on its affiliate, A&E Network. Joe Schlosser, *Cable's Class of 1995: A Look at How the Major Cable Launches of That Year*

widespread distribution and become cash-flow positive. It is, of course, impossible to predict how many of these networks will have begun to become commercially viable by the first quarter of 2000. In all likelihood, many will still be unprofitable and struggling to survive at that time, while others may have just turned the corner to cash-flow positive operations. However, one thing is clear: in no way will these new networks be capable of shouldering a financial burden from closed captioning identical to that of their much larger, more well-established rivals. Yet, all will be given "equal" treatment under the rules.

As discussed by Petitioners in their Comments, the impact of the pending closed captioning requirements on new networks such as Petitioners will be disproportionately large and adverse, and will threaten some emerging new networks' very existence.¹² In the Order, the Commission stated: "[w]e do not intend our closed captioning requirements to inhibit new sources of video programming due to our interest in fostering diversity in video programming."¹³ Yet, absent reconsideration by the Commission, the new network exemption will be inadequate to protect emerging networks such as Petitioners from the adverse economic impact of the closed captioning requirements.

Have Fared, BROADCASTING & CABLE, March 17, 1997, at 65), or through retransmission consent agreements (e.g., Home & Garden TV, owned by broadcast station-owner E.W. Scripps Co. Lee Hall, *NCTA 1997: Islands in a Sea of Networks, Stand Alones Face Hurdles*, ELECTRONIC MEDIA, March 17, 1997, at 1).

¹² Comments at 16 - 31.

¹³ Order at ¶ 154.

B. The Commission's Adoption Of An "Absolute Hours" Formula For Captioning Of New Programming During The Transition Period Exacerbates The Harm To New Networks

The imminent harm that new networks will suffer under the rules is exacerbated by the Commission's adoption of a rule whereby its interim benchmark levels for required amounts of captioned new programming are established as an *absolute* number of hours each quarter (e.g., for the years 2000 - 2001, 450 hours per quarter or, if the network provides less than this amount, 95% of new programming).¹⁴ This rule marks a dramatic and abrupt departure from the approach proposed in the NPRM, in which the required levels of captioning were discussed as a *percentage* of new programming displayed (e.g., for years 2000 - 2001, 25% of new programming aired).¹⁵

The effect of this change is substantial. A network with a 75% - 25% mix of new and pre-rule programming will be required to caption an average of 218 *additional* hours of new programming during the years 2000 - 2005 under the "absolute hours" approach as compared to the NPRM's "percentage" approach.¹⁶ Thus, it is estimated that the "absolute hours" approach will require a network to expend an additional **\$218,000** per year during the transition period.¹⁷ Moreover, a network that relies heavily on pre-rule programming will be required to caption *virtually all* of its new programming once the first interim benchmark period arrives. While this

¹⁴ 47 C.F.R. § 79.1(b).

¹⁵ NPRM at ¶¶ 6, 41.

¹⁶ During 2000 and 2001, the difference is 109 hours per quarter. During 2002-2003 and 2004-2005, the difference is 218 and 326 hours per quarter, respectively. Thus, the average difference over this period is 218 hours per quarter $[(109 + 218 + 326) \div 3]$.

¹⁷ This amount is computed using conservative captioning costs of \$1,000 per hour and a "four-times" repeat factor for new programming.

rule change increases the burden on all programmers, such additional expenditures are disproportionately harmful to Petitioners and other new networks because of their far more limited financial resources.

C. The Commission's 'Two Percent Expense Cap' Rule Provides No Relief To National Basic Cable Networks Such As Petitioners

The Commission also adopted a rule whereby a network need not expend more than an amount equal to two percent of its gross revenues from the previous calendar year on captioning expenses.¹⁸ Petitioners appreciate the Commission's attempt to mitigate the economic impact of closed captioning. For some video programming providers, such as LPTV stations or small-market broadcast stations, this rule may achieve the Commission's objective to "minimize the economic burden of captioning video programming while at the same time requiring efforts to increase video accessibility by as many entities as possible."¹⁹ However, this is *not* the case for national basic cable networks.²⁰ In short, because of the economics of this industry segment, the "Two Percent Expense Cap" rule will not provide any relief to Petitioners or other new

¹⁸ 47 C.F.R. § 79.1(d)(11); Order at ¶ 164.

¹⁹ Order at ¶ 18.

²⁰ As explained in their *Ex Parte* Memorandum submitted to Commission staff on July 24, 1997 (at p. 3), Petitioners will each require at least \$50 million in annual revenues before they can begin to operate on a cash-flow positive basis, and it is only at the \$75 million level where they each will begin to recoup their start-up losses and become established and profitable. Given that such revenue levels are needed to sustain the operations of nationally-distributed cable networks, Petitioners estimate that compliance by new and recently-launched networks with the captioning rules generally will not exceed the two percent expense cap. Nonetheless, expenditures for captioning would be substantial indeed, amounting to hundreds of thousands of dollars, and will require Petitioners and other recently-launched networks to displace other priority expenditures—funds that are currently allocated to programming, production or marketing—thus further weakening their ability to sustain commercially-viable operations.

nationally-distributed cable networks. The specified percentage amount, two percent, is simply too large to provide any form of relief.²¹

IV. NEW PROGRAMMING NETWORKS SHOULD BE AFFORDED A FIVE-YEAR EXEMPTION PERIOD FROM CAPTIONING, AND THE FULL EIGHT-YEAR TRANSITION PERIOD FOR CAPTIONING OF NEW PROGRAMMING ONCE THE EXEMPTION EXPIRES

As discussed above, the new network exemption, as currently structured, provides insufficient relief to new programming networks in general and no relief whatsoever to Petitioners and many other recently-launched networks. As a result, Petitioners anticipate that the Commission will be inundated with petitions from new networks for exemptions under the "undue burden" standard once the first benchmark period approaches.²² Petitioners submit that the better approach would be for the Commission to modestly adjust its new network exemption in the following manner: (1) the exemption period should be extended from four to five years from launch, and (2) once a network loses its new network exemption, it should be afforded the full eight-year transition period for compliance with captioning requirements applicable to new programming.

Elimination of the "drop-in" requirement is necessary to make the exemption real, rather than illusory, for recently-launched networks, and to eliminate the inequity that will result when recently launched new networks such as Petitioners are required, once their exemptions expire, to caption at the same level as established networks despite these new networks' tenuous financial

²¹ In an *Ex Parte* Memorandum submitted to Commission staff on July 24, 1997, Petitioners proposed a progressive formula for an expense cap. The maximum proposed percentage under this formula was 0.6%—approximately the same level as music licensing fees paid in the aggregate to ASCAP and BMI by video programming networks.

²² See 47 U.S.C. § 613(d)(3) and 47 C.F.R. § 79.1(f).

posture. For example, Petitioners' exemptions will expire before any established cable network is required to be in compliance with the captioning requirements. Moreover, because of the drop-in requirement of the rules, upon the expiration of their exemptions in 1999 and 2000, Golf and Speedvision will be required to caption an identical amount of programming as ESPN, and Outdoor Life will be required to caption as much programming as Discovery Channel. But in no way are these networks equal in terms of financial, technical or administrative resources. Petitioners' proposed change would render the relief to be provided by the new network exemption real, rather than illusory, and would help reduce the disparate impact that captioning will impose on new networks, relative to their larger, established competitors.

Petitioners also ask that the Commission extend the exemption period for new networks to five years. Such an exemption was proposed by the National Cable Television Association ("NCTA") and endorsed by many others in comments.²³ In the Order, the Commission reduced this proposed exemption period from five years to four, without explanation. However, as the NCTA explained in its comments, a period of at least five years is necessary and appropriate, as this period is generally needed for a new network to gain acceptance in the marketplace and to reach a position of positive cash-flow operations.²⁴

Petitioners' proposed changes to this rule will have only a slight impact on the overall amount of captioned video programming available to persons with hearing disabilities. Because of their limited distribution, new networks provide only a small fraction of the universe of video

²³ See NCTA Comments at 20. See also A&E Comments at 23; C-SPAN Comments at 10; Lifetime Reply Comments at 4; Viacom Reply Comments at 14.

²⁴ NCTA Comments at 19.

programming available to the public,²⁵ and viewership of such channels is far below that of more established cable networks and broadcast stations. Moreover, in light of the difficulties facing new networks, the duration of Petitioners' request for additional deferral is, indeed, quite modest. For example, a network launched in the first quarter of 1994 would have its captioning requirement deferred for only fifteen additional months.

Petitioners emphasize that this proposed modification will *not* make compliance and enforcement mechanisms more complex. As with standard industry practice for compliance with the Commission's children's cable programming rules,²⁶ each network will likely provide a quarterly certificate of compliance to those MVPDs by which it is carried. This process will in no way be disrupted or complicated by Petitioners' proposal, as each network can readily identify where it is on the transition schedule and certify its compliance with the rules. Industry-wide uniformity of the transition schedule is not needed under such a system.

Finally, should the Commission decline to adopt both aspects of this proposal, Petitioners ask that the Commission, at a minimum, restructure the new network exemption to eliminate the "drop-in" component once the exemption expires. For, it is critical that Petitioners and other new networks be afforded a full eight-year transition period for captioning of new programming. Such a rule change—while minor—would do much to alleviate the looming and disparate burden of mandatory captioning upon new and recently-launched networks.

²⁵ In this regard, Petitioners calculated that low-penetrated national basic cable networks provide service to only approximately seventeen percent of all national basic cable subscribers. *See Comments* at 34 - 35.

²⁶ 47 C.F.R. § 225.

V. CONCLUSION

Petitioners have explained how three problematic features of the new network exemption and the closed captioning rules render the exemption wholly illusory to them and many other recently-launched networks. Moreover, Petitioners explained how the exemption provides insufficient relief to new networks overall. Petitioners are not, however, asking the Commission to completely (or even partially) overhaul the structure of its carefully-balanced closed captioning rules. Rather, Petitioners ask the Commission to make only the minimal adjustments needed for the exemption to serve its intended purpose of providing meaningful relief to new networks.

Accordingly, Petitioners respectfully request the Commission to partially reconsider its Order to restructure its new network exemption, 47 C.F.R. § 79.1(d)(9), so that (1) the period of exemption be extended to five years from launch, and (2) a new network is afforded a full eight-year transition schedule for captioning of new programming after the network's exemption expires.

In the alternative, Petitioners request the Commission to partially reconsider this exemption to specify that a new network is afforded a full eight-year transition schedule for captioning of new programming after the network's four-year new network exemption expires.

Respectfully submitted,



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